

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2197-FT

Cir. Ct. No. 2012FA21

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MARY MICHELLE FALSTAD,

PETITIONER-APPELLANT,

V.

STEVEN BERNIE FALSTAD,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Barron County:
JAMES D. BABBITT, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Mary Falstad appeals her judgment of divorce, arguing the circuit court erroneously considered Steven Falstad's pension as an

income stream and not an asset subject to division.¹ We agree and reverse. The matter is remanded for consideration of the pension in the property division.

¶2 The parties were married in 2001 and divorced in 2012. There were no children born of the marriage. At the time of the divorce, Steven was sixty-four years old and Mary was sixty-one. Both parties waived maintenance. The sole issue pertinent to this appeal involved Steven's pension. The circuit court concluded retirement plan benefits earned during marriage must generally be considered in the property division at divorce, but the rule was not absolute. The court determined it had discretion to categorize the pension as either income or as an asset. The court reasoned:

Here, [Steven's] pension is already in pay status, and has been for the entirety of the marriage. If [Steven] had to part with his pension, he would not have the same monthly income and would require maintenance from [Mary], despite having waived it. ... [I]n order to avoid roundabout payments, the pension must be treated as an income stream to maintain [Steven's] monthly income.

¶3 On appeal, Mary argues the circuit court's decision regarding Steven's pension is directly at odds with our supreme court's decision in *Steinke v. Steinke*, 126 Wis. 2d 372, 376 N.W.2d 839 (1985). In that case, the court held the value of a spouse's interest in a pension must be included by the trial court in a division of the property between the spouses, as a matter of law. *Id.* at 380. Mary argues the circuit court in the present case erroneously relied upon our decision in *Dutchin v. Dutchin*, 2004 WI App 94, ¶20, 273 Wis. 2d 495, 681 N.W.2d 295,

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. References to the Wisconsin Statutes are to the 2011-12 version.

holding a circuit court has discretion to treat pensions as income streams to render equitable and fair results.

¶4 Steven concedes our supreme court's *Steinke* decision mandated that pension funds be considered part of the marital estate subject to property division at divorce. He also impliedly acknowledges that if an opinion of the court of appeals is inconsistent with a supreme court decision, we must follow the supreme court decision. See *Cuene v. Hillard*, 2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509.

¶5 However, Steven insists any error in the present case was harmless. He argues there is no reasonable possibility the outcome would have been different had the circuit court made no reference to *Dutchin* or income streams. Steven reasons that the court did not treat the pension in isolation but, rather, in the context of fashioning an "equitable and fair" result in the overall property division. Therefore, had the pension been properly considered in the property division, Steven assumes the circuit court would have varied from an equal division of his pension and awarded the entire value to him.

¶6 Steven's assumption cannot be supported by the existing record. The circuit court's decision concerning the pension is devoid of analysis of the statutory factors under WIS. STAT. § 767.61(3) that would overcome the rebuttable presumption of an equal property division. There is no statutory presumption of an equal division of marital income upon a divorce judgment, as there is in division of the marital estate. *Steinke*, 126 Wis. 2d at 379. A court must apply the presumption of equal division to monthly pension payments, as well as to the parties' other assets, and may deviate from an overall equal division only after considering the factors provided in § 767.61(3).

¶7 The circuit court upon remand may ultimately come to the same outcome when it applies the statutory factors to Steven's pension in a property division analysis. However, without a record of that analysis as it relates to the pension, we cannot conclude the outcome would have been the same. As a result, we must reverse the judgment and remand for the court to consider Steven's pension in the property division.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

